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In The

Supreme Court of the United States

October Term, 1995

ALEX CORNELIUS BONNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the canine sniff of Petitioner's luggage inside the taxicab was a search for purposes of the Fourth Amendment to the United States Constitution and whether reasonable suspicion was required to conduct the narcotic dog sniff?

2. Whether the canine sniff of Petitioner's luggage constituted an unlawful seizure within the meaning of the Fourth Amendment where the sniff meaningfully interfered with Petitioner's possessory interest in his luggage, where it impaired Petitioner's right to freedom of movement with his luggage, and where the officers lacked reasonable suspicion?

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Petitioner, Alex C. Bonner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on May 30, 1995 refusing to suppress from evidence cocaine seized pursuant to a canine sniff of Petitioner's luggage inside the rear of a taxicab where probable cause was unlawfully obtained by overreaching police actions and thus use of the evidence constitutes fruit of an illegal search.

OPINIONS BELOW

The opinion of the Court of Appeals appears in Appendix A to this Petition. The unpublished Opinion of the District Court for the Middle District of Florida appears in Appendix B to this Petition. The recommended ruling of the Magistrate which was not adopted by the District Court appears in Appendix C to this Petition.

GROUNDS FOR JURISDICTION

The Court of Appeals Opinion in this matter was filed on May 30, 1995 on the non-argument calendar and; therefore, no Petition for Rehearing was filed. This Court's jurisdiction is invoked under Title 28, U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV to the United States Constitution is set forth in Appendix D.

STATEMENT OF THE CASE

The United States District Court, Middle District of Florida, Jacksonville Division, had jurisdiction pursuant to Title 18, U.S.C. §3231. Petitioner in the Middle District of Florida, charging him with one count of conspiracy to distribute cocaine in violation of 21 U.S.C. §846. On May 5, 1994, Petitioner entered a plea of not guilty to the indictment. On June 9, 1994, Petitioner filed two motions to suppress evidence: a Motion to Suppress All Evidence Seized as a Result of an Unlawful Search and Seizure and a Motion to Suppress All Evidence Seized as a Result of Mr. Bonner's Arrest on April 14, 1994. On June 14, 1994 the hearing on Petitioner's motions to suppress evidence was held before a Magistrate and on June 23, 1994 the Magistrate issued his Report and Recommendation, recommending that the former motion be granted and the latter motion be denied.

On June 24, 1994, the United States objected to the Report and Recommendation. On July 5, 1994, Petitioner responded to the United States' objections. On July 6, 1994 the hearing on the United States' objections was held before a District Court Judge. On July 8, 1994, the District Court issued its Order and Memorandum which disagreed with the Magistrate's recommendation and denied Petitioner's first motion to suppress and upheld

the Magistrate's denial of Petitioner's second motion to suppress.

On July 12, 1994 Petitioner entered a plea of guilty on Count One of the Indictment, reserving his right to appeal the District Court's Order of July 8, 1994. On September 14, 1994 the district court entered judgment against Petitioner on Count One sentencing Petitioner to 151 months' imprisonment, sixty months' supervised release and imposing a fifty dollar special assessment.

On September 16, 1994 Petitioner filed a Notice of Appeal of the district court's Order of July 8, 1994. On May 30, 1995 the United States Court of Appeals for the Eleventh Circuit, without oral argument, issued its Opinion finding no error and affirming the district court's order.

In its Opinion the Eleventh Circuit found that the taint from the initial, constitutionally impermissible detention was dissipated. Thus, the remaining question was whether the actions of the drug detection dog inside the taxicab constituted a seizure. In response to this issue, the Eleventh Circuit held that the canine sniff inside the taxicab constituted a minimal intrusion and as such did not impair the Petitioner's freedom of movement or meaningfully interfere with Petitioner's possessory interest in his luggage. Thus, the Eleventh Circuit concluded that the canine sniff inside the taxicab did not constitute a seizure under the Fourth Amendment as interpreted by the Eleventh Circuit in *United States v. Puglisi*, 723 F.2d 779, 787 (11th Cir. 1984). Nonetheless, the Eleventh Circuit held that even if the drug detection dog's actions inside the taxi constituted a seizure under the Fourth

Amendment, said seizure was based on reasonable suspicion that Petitioner was carrying drugs in his luggage.

In sum, the Eleventh Circuit held as follows: "[f]irst, the drug dog's brief 'seizure' of the luggage was not a seizure under the Fourth Amendment. Second, if it were a seizure requiring reasonable suspicion under *Terry*, reasonable suspicion existed."

ESSENTIAL FACTS

On October 3, 1990 Petitioner placed a call from a pay telephone at the Amtrak station in Hollywood, Florida while he waited to board his train to Ocala, Florida. Sgt. John Murray of the Hollywood, Florida Police Department observed Petitioner, and based on a "gut feeling" that Petitioner was carrying drugs, approached and questioned Petitioner. Upon request, Petitioner produced a valid driver's license and train ticket with a destination of Ocala. After running a "wants and warrants" check which revealed nothing, Sgt. Murray told Petitioner he was free to leave and Petitioner boarded his train to Ocala.

Sgt. Murray thought the Ocala officers may be able to develop probable cause to arrest Petitioner. At approximately 6:00 p.m. he contacted Officer Keith Escaravage of the Ocala Police Department with a detailed description of Petitioner. In response to Sgt. Murray's call, eight officers and two drug detection dogs awaited Petitioner's arrival to Ocala. Petitioner's train arrived at approximately 10:20 p.m. and Officer Escaravage and Officer Larry Butler met Petitioner at the train tarmac, escorted

him to the station, questioned him, and ran a second "wants and warrants" check which revealed nothing. As he had earlier that evening in South Florida, Petitioner refused to consent to either a search or a canine sniff of his luggage.

Petitioner was standing with his back against a wall surrounded by the eight officers when the officers concluded they lacked sufficient probable cause to search Petitioner's luggage or arrest him. (R1-56-14). For the second time that night Petitioner was told that he was free to leave. However, Officer Butler decided to further the investigation by offering to call Petitioner's friend in Ocala from a pay telephone booth. Petitioner provided the officer with the telephone number. When the call was successfully put through, Petitioner partially entered the phone booth in order to speak to the party. Petitioner was holding his luggage when Deputy Terry Bovaird approached the telephone booth with his drug detection canine, a blonde labrador retriever named Spark the Narc (known as Spark). Upon seeing Spark approach, Petitioner pushed himself farther into the telephone booth while raising his luggage up to his chest. Not understanding the situation, Officer Butler pushed Petitioner out of the booth while Petitioner kicked toward Spark causing the dog to back off. Despite their bold efforts the officers determined that they still had an insufficient legal basis to search or arrest Petitioner and told Petitioner he was free to leave.

But the investigation continued; Sgt. Miller of the Ocala Police Department authorized overtime to pursue Petitioner. Five officers followed Petitioner through town

in four different vehicles. The officers watched as Petitioner made two or three calls from a pay telephone in town; however, Petitioner walked away when Deputy Bovaird went to retrieve Spark.

Petitioner, with the officers in close pursuit, walked two blocks north and four blocks west to the Circle K convenience store. It was now 12:00 midnight, close to two hours since Petitioner's 10:20 arrival in Ocala. While Petitioner was using the pay telephone outside the store Deputy Bovaird attempted to walk Spark past Petitioner's unattended luggage, fifteen to twenty feet away. At that moment, a station wagon taxicab arrived and after speaking with the driver Petitioner placed his luggage in the rear of the cab. The hatchback was halfway closed when Deputy Bovaird prevented the driver from shutting the door and ordered Spark to smell for drugs. Responding to the command, Spark leapt into the rear of the taxicab and on top of Petitioner's luggage at which time Petitioner pulled his luggage out from under Spark and began to walk away. Spark exhibited a change in behavior which Deputy Bovaird testified was a precursor to an alert to the odor of drugs. Spark, no longer held by his leash, followed Petitioner and made a full alert. Because Petitioner refused to put his luggage down when told to do so by Deputy Bovaird, the officers decided to arrest Petitioner for the misdemeanor crime of obstructing an officer.

Petitioner was escorted to a police vehicle while Spark alerted a second time to the luggage. A second drug detection dog, Sharkey, also alerted to the luggage.

At the scene the officers conducted a warrantless search of Petitioner's luggage and found cocaine.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case involves an intrusive dog sniff, not of the routine type addressed by this Court in *United States v. Place*, 462 U.S. 696 (1983) and therefore presents an issue only partially resolved by implication and never directly addressed by this Court. Exploration of the limits of dog searches will provide constitutional guidelines for law enforcement agencies and courts to follow. Further, the Opinion below conflicts with previous decisions of this Court and with the decisions of other circuits.

WHETHER THE CANINE DOG SNIFF INSIDE THE TAXICAB WAS A SEARCH IN VIOLATION OF PETITIONER'S REASONABLE EXPECTATION OF PRIVACY AND WHETHER REASONABLE SUSPICION WAS REQUIRED?

In *United States v. Place*, 462 U.S. 696 (1983) this Court held that canine sniffs are not seizures. Courts routinely cite this Court's ruling in *Place* to support their holdings that sniffs are not searches for Fourth Amendment purposes. However, in *Place* the dog sniff was dictum because the case did not turn on the dog sniff but rather on the permissible limits of an investigative stop. *Id.* at 698. *Place* involved a canine sniff of luggage already seized by agents. The officers in *Place* were attempting to take the bags to a federal judge in order to obtain a search

warrant. Place was not present when the bags were subjected to a dog sniff as he had declined to accompany the officers. With respect to the narcotics-dog sniff, this Court concluded that "exposure of respondent's luggage, which was located in a public place, to a trained canine did not constitute a 'search' within the meaning of the Fourth Amendment." *Id.* at 707.

The dictum in *Place* became the test adopted in *United States v. Jacobsen*, 466 U.S. 109 (1984) even though *Jacobsen* did not involve a canine sniff of luggage but rather a chemical test of a package in the possession of a private freight carrier. *Id.* at 111. This Court concluded the field test was not a search because any legitimate privacy interest was too remote to characterize the testing as a Fourth Amendment search. In addition, this Court found no seizure occurred because the destruction of the cocaine powder during the test was considered to have only a *de minimis* impact on defendant's protected property interest. Thus, *Jacobson* cemented this Court's holding in *Place* that a sniff is not a search. Nonetheless, *Jacobson* does not contribute to a fuller understanding of the constitutional implications of dog sniffs.

Since *Place* and *Jacobson*, federal courts have applied the *Place-Jacobsen* holdings to a wide array of factual situations which possibly warrant a more particularized approach. For example: canine sniff of car in a motel parking lot was not a search requiring reasonable suspicion, *United States v. Ludwig*, 10 F.3d 1523 (10th Cir. 1993); canine sniff of Amtrak roomette from public area was not a search, *United States v. Colyer*, 878 F.2d 469 (D.C. Cir.

1989); canine sniff of luggage secured in overhead compartment of bus was not a search or a seizure, *United States v. Harvey*, 961 F.2d 1361 (8th Cir. 1992); boarder patrol agents sniff of bag removed from baggage holding area was not a search or a seizure, *United States v. Garcia* 849 F.2d 917 (5th Cir. 1988). *United States v. Rodriguez-Morales*, 929 F.2d 780, 788 (1st Cir. 1991); *United States v. Garcia*, 42 F.3d 604, 605-606 (10th Cir. 1994). Based on *Place* courts hold that no Fourth Amendment challenge to canine sniffs exists regardless of the differing degrees of intrusion involved.

One notable exception to this trend is the Second Circuit's decision in *United States v. Thomas*, 757 F.2d 1359 (2nd Cir. 1985) holding that a warrantless dog sniff outside an apartment constituted a search. "It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy." *Id.* at 1366 citing *United States v. Katz*, 389 U.S. 347 (1967). In reconciling its holding with that of this Court's in *Place*, the *Thomas* court focused on the heightened expectation of privacy one has inside one's home. *Id.* at 1367. The court reasoned that "a practice that is not intrusive when employed in a public airport may be intrusive when employed at a person's home." *Id.* at 1366.

In rejecting *Place's* overbroad rule that all canine sniffs are not searches, the *Thomas* court acknowledged that the Fourth Amendment may be implicated if the sniff occurs in a zone with a recognized expectation of privacy. Since *Thomas*, some courts have expanded the inquiry to consider whether canine sniffs impede upon a substantial

liberty interest. Hope Walker Hall, Comment, *Sniffing Out the Fourth Amendment: United States v. Place – Dog Sniffs – Ten Years Later,* 46 Me. L. Rev 151, 173 n. 139, (1994). Note the following cases which refer to the Thomas holding: *United States v. Stone,* 886 F.2d 359, 363 n. 1 (10th Cir. 1989) stating that the heightened expectation of privacy in the home is distinguishable; *United States v. Liberto,* 660 F. Supp. 889, 891 (D.C. Cir. 1987) holding that a train roomette was not covered by *Thomas; United States v. Sklar,* 721 F. Supp 7, 14 (Mass. Dist. Ct., 1989) finding that the privacy interest at issue involved luggage as discussed in *Place* and not an apartment as discussed in *Thomas.* These references to the holding and reasoning of the Second Circuit in *Thomas* indicate a reluctance among the lower courts to ignore the legitimate privacy rights which a sniff, under some circumstances, might violate.

PETITIONER HAD A LEGITIMATE EXPECTATION OF PRIVACY INSIDE THE TAXICAB WHICH INCLUDED THE AIRSPACE SURROUNDING HIS LUGGAGE

The canine sniff of Petitioner's luggage inside the taxi cannot be compared with the type of airport sniff *Place* and its progeny address. In *United States v. Katz,* 389 U.S. 347, 353 (1967) this Court held that Fourth Amendment protection depends on whether the person claiming the right has a legitimate expectation of privacy in the invaded place. *Rakas v. Illinois,* 439 U.S. 128, 142 (1978), *United States v. Katz,* 389 U.S. 347, 353 (1967), *United States v. Chadwick,* 433 U.S. 1, 7 (1977), *United States v. White,* 401 U.S. 745, 752 (1971). The Fourth Amendment

protects "people not places." *United States v. Katz*, 389 U.S. 347, 361 (1967).

A person may possess a reasonable expectation of privacy in a taxicab according to this Court in *United States v. Rios*, 364 U.S. 253, n.6 (1960) and the Magistrate was correct in concluding that Petitioner probably had such an expectation. Moreover, in *Place*, this Court acknowledged that the respondent continued to possess a reasonable expectation of privacy in his luggage, which this Court found was not violated by the canine sniff. *United States v. Place*, 462 U.S. 696, 701 (1983). *Place's* holding that no search occurred was based on a canine sniff of luggage which was no longer in the suspect's presence and which had been temporarily placed in the custody of a common carrier.[1] The conclusion of this Court in *Place* is as follows: "exposure of respondent's luggage, which was located in a public place, to a trained canine did not constitute a search within the meaning of the Fourth Amendment." *Id.* at 707.

Unlike that of the respondents in *Place*, Petitioner's luggage was not located in a public place and Petitioner never relinquished control. Spark's command to sniff was made while Petitioner was present and the luggage was in the joint possession of Petitioner and a private carrier. Furthermore, as the Magistrate Judge stated "[t]he events

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[1] The following cases all involve a canine sniff of baggage in the custody of a common carrier where the suspects were not present: *United States v. Beale*, 736 F.2d 1289 (9th Cir. 1984); *United States v. Goldstein*, 635 F.2d 356, 358 (5th Cir. 1981), cert. denied, 452 U.S. 962 (1981); *United States v. Sullivan*, 625 F.2d 9, 12 (4th Cir. 1980).

in this case, however, are not the type of 'brief, minimally intrusive' dog sniff routinely contemplated." *United States v. Hardy*, 855 F.2d 753, 759 (11th Cir. 1988). Petitioner's case must be differentiated from those where a narcotics dog, not commanded to do so, instinctively jumps inside a car. In his Report and Recommendation the Magistrate further states that Officer Bovaird's command reasonably caused Spark to jump inside the taxi and therefore, Spark's conduct should be imputed to Deputy Bovaird because it was neither so unexpected or unreasonable that Spark would leap inside.

Compare, for example, the instant case with the following cases involving canine sniffs inside vehicles. In *United States v. Watson*, 783 F.Supp. 258 (E.D.Va. 1992) the district court looked to *United States v. Stone*, 866 F.2d 359 (10th Cir. 1989) for guidance and concluded that no seizure occurred because the dog handler did not encourage the dog to jump into the car. *Id.* at 265. The suspect in *Watson* had left the driver's side door of the car open. *Watson* at 262. In *Stone*, the court found the dog's instinctive actions did not violate the Fourth Amendment because police did not ask the defendant to open the hatchback nor did the police handler encourage the dog to jump into the car. *Id.* at 364. In determining the reasonableness of an asserted privacy violation this Court stated that no single factor is determinative, *Rakas v. Illinois*, 439 U.S. 128, 152 (1978) (Powell, J., concurring), and consideration is given to whether the person took normal precautions to maintain privacy. *Id.* at 152. Here, Deputy Bovaird encouraged Spark to jump in the rear of the taxi by preventing the driver from closing the hatchback while simultaneously commanding Spark to sniff.

The act of shutting the hatchback is indicative of an intent to maintain privacy. In both *Stone* and *Watson* the suspects left their doors open making the canine sniffs in these cases far less intrusive than the one at issue.

Despite finding no Fourth Amendment violation, the *Stone* court remarked on the difference between sniffing the outside of a vehicle and sniffing the inside – "the dog created a troubling issue under the Fourth Amendment when it entered the hatchback." *Id.* at 363. Petitioner's case is not factually analogous to *Stone* and *Watson* for it involves a substantial, uninvited intrusion. The cases adhering to the *Place* holding do not involve a canine sniff inside a vehicle where the police acted deliberately.

In refusing to classify a police investigation technique, such as a dog sniff as a search, this Court enables potential Fourth Amendment violations to escape judicial scrutiny. Hope Walker Hall, Comment, *Sniffing Out the Fourth Amendment: United States v. Place – Dog Sniffs – Ten Years Later,* 46 Me. L. Rev 151, 156 (1994).

COURTS ARE NOT IN AGREEMENT OVER WHETHER REASONABLE SUSPICION IS REQUIRED

In *Place,* this Court stated that luggage may be exposed to a narcotics-sniffing dog where police officers have reasonable suspicion that the luggage contains narcotics. *United States v. Place,* 462 U.S. 696, 706 (1983).

A majority of courts follow *Place* either by finding that reasonable suspicion existed for the sniff (leaving open the question of whether it was required), or that reasonable suspicion was required. *United States v. Germosen-Garcia,* 712 F. Supp. 862 (D. Ct. Kan., May 9,

1989). Some courts, such as the Ninth Circuit in *Beale III*, are silent as to the issue of reasonable suspicion. *United States v. Beale*, 736 F.2d 1289 (9th Cir. 1982). A minority of courts have departed from the rule in *Place* in holding that a narcotics dog sniff does not require reasonable suspicion. In *United States v. Goldstein*, 635 F.2d 356 (5th Circuit, Unit B 1981), *cert. denied*, 452 U.S. 962 (1981) the Fifth Circuit expressly stated that no level of articulable suspicion was required for a narcotics dog sniff. *Id.* at 361. The *Goldstein* court reasoned that because the narcotics-dog sniff was neither a search nor a seizure, reasonable suspicion is not required for a luggage sniff "when the luggage is" in the custody of a common carrier. *Id.* at 361.[2] The Tenth Circuit in *United States v. Garcia*, 42 F.3d 604 (10th Cir. 1994) is in accordance with *Goldstein* in holding that the dog sniff of luggage in the train's baggage car without reasonable suspicion did not violate defendant's Fourth Amendment rights. *Garcia* at 606. The suspect in Garcia had an expectation that the contents of his checked luggage would not be exposed absent consent; however, the court concluded that this expectation of privacy did not extend to the air surrounding the luggage." *Id.* at 604. (citing *United States v. Morales-Zamora*, 914 F.2d 200 (10th Cir. 1990).

The question remains whether the *holdings in Garcia* and *Goldstein* are contrary to that of this Court's in *Place* which required reasonable suspicion. Furthermore,

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[2] A common carrier is any carrier required by law to convey passengers of freight without refusal if the approved fare or charge is paid in contrast to private or contract carrier. *Black's Law Dictionary*, 249 (5th ed. 1979).

whether under the precedent of *Place* reasonable suspicion is required for a narcotics dog sniff of luggage still in the possession of the suspect.

WHETHER THE CANINE SNIFF RESULTED IN A SEIZURE OF PETITIONER AND HIS LUGGAGE?

A seizure of personal property is defined as "some meaningful interference with an individual's possessory interest in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). However, "luggage, unlike a person, has no Fourth Amendment rights. The Fourth Amendment, accordingly, is implicated only when a police seizure of an item impairs a person's possessory interest, or a search impairs a person's reasonable privacy interest in the item." *United States v. Puglisi*, 723 F.2d 779, 785 (11th Cir. 1984). *Place* recognized that there are degrees of intrusion, the most severe being those which involve a seizure of personal effects which are still in the immediate possession of the owner and control has not been relinquished. *United States v. Place*, 462 U.S. 696, 705 (1983).

The Fifth Circuit in *Goldstein* found Goldstein's possessory interests were not impaired because he had relinquished possession of his luggage to the airline several hours before the canine sniff.[3] Further, the court reasoned that had the dog not alerted, Goldstein's luggage would have been returned to the baggage cart with no delay, injury, or impairment. *Id.* at 786.

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[3] *United States v. Goldstein* was decided by the Fifth Circuit in 1981 prior to the formation of the Eleventh Circuit.

Contrary to the suspect in *Goldstein*, Petitioner had not relinquished control of his luggage when Spark entered the taxi to sniff for narcotics. Moreover, Spark and Deputy Bovaird's conduct prevented Petitioner from leaving in the taxicab with his luggage. Certainly this constraint on Petitioner's freedom of movement was the most severe type of seizure according to the rule set forth by the Eleventh Circuit in *United States v. Puglisi*, 723 F.2d 779, 787-788 (11th Cir. 1984).

Although the Magistrate Judge found no search occurred, he did correctly conclude, based on the test in *Puglisi*, that Petitioner and his luggage were seized.

THE OFFICERS DID NOT POSSESS REASONABLE, ARTICULABLE SUSPICION

The Court of Appeals for the Eleventh Circuit was correct in holding that the initial detention at the Ocala train station was impermissible and constituted a seizure under *Terry v. Ohio*, 446 U.S. 544, 554 (1980). However, in holding that the taint from this illegal seizure was dissipated the appellate court failed to consider the totality of the circumstances. Specifically, the court ignored the overreaching conduct of the police and the coercive environment their presence created.

In *Schneckloth v. Bustamante*, 412 U.S. 218 (1973) this Court acknowledged that a person's "consent" may be a product of duress or coercion, express or implied, and as such must be viewed by the totality of the circumstances. *Id.* Furthermore, in *United States v. Valdez*, 931 F.2d 1948 (11th Cir. 1991) the Eleventh Circuit applied the following factors to determine whether consent was tainted by the

illegal detention: the temporal proximity of the illegal detention and the consent; intervening circumstances; and the purpose and flagrancy of the official misconduct. *Id.* at 1452 (quoting *United States v. Berry*, 670 F.2d 583, 604-05 (5th Cir. 1982)).

In the instant case the Magistrate Judge held that the taint from the initial illegal detention was not dissipated based on its proximity of the consent to the illegal arrest and the lack of intervening circumstances. *United States v. Valdez*, 931 F.2d 1448, 1452 (11th Cir. 1991), and *United States v. Berry*, 670 F.2d 583, 604-05 (5th Cir. Unit B, 1982). The Magistrate Judge concluded that Petitioner's "consent" to remain at the station was tainted by the illegal detention, and thus the events in the telephone booth could not be used to form the basis of any level of suspicion.

GOVERNMENT CREATED REASONABLE SUSPICION

Petitioner heard the words "free to leave" while he stood with his back against a wall surrounded by eight officers standing around him in a semi-circle. (R1-56-4). Officer Butler's offer to place the call for Petitioner's friend in Ocala occurred on the heels of the first detention and there were no intervening events between the unlawful detention and the officer's offer. Officer Butler testified as to the circumstances surrounding Petitioner's consent to have the call placed by the officer.

A: He gives me the number, he said okay, he gives the number.

Q: Did he walk towards the phone?

A: No, sir, he never left the spot.

Q: He didn't walk towards the phone?

A: No, sir.

Q: Were these eight police officers and the two dogs between him and the telephone?

A: Well, we kind of surrounded, he's like up against the wall. I mean, not like, don't get me wrong, he's standing at the wall, okay, I don't want to use the term up against the wall, he's standing up by the wall, like on the ground, the officers were around him in a semi-circular fashion.

(R1-56-13-14).

In *United States v. Miller,* 821 F.2d 546 (11th Cir. 1987) the Eleventh Circuit cited to this Court's acknowledgment that "a traffic stop is an unsettling show of authority that may 'create substantial anxiety'." *Delaware v. Prouse,* 440 U.S. 648, 657 (1979). The Eleventh Circuit in *Miller* concluded that defendant's consent to a search immediately following the traffic stop constituted insufficient intervening circumstances to reduce the coercive nature of the stop making the consent truly voluntary. *United States v. Valdez,* 931 F.2d 1448, 1451 (11th Cir. 1991) discussing *United States v. Miller,* 821 F.2d 546 (11th Cir. 1987). As evidenced by Officer Butler's testimony, Petitioner's unlawful investigatory stop clearly involved an unsettling show of authority which reasonably caused Petitioner substantial anxiety.

"[A]cquiesence cannot substitute for free consent." *United States v. Berry,* 670 F.2d 583 (5th Cir. 1982). Although cloaked as a friendly gesture Officer Butler's offer to place the call was a show of authority and a means to further the investigation.

Q: The purpose of doing this was just to be a nice guy?

A: Honestly, it was a two-fold purpose, one was to, just to see where it was going to go, and yes, to be nice, because I had to use my own quarter.

Q: Truth though, you didn't want Bonner to leave yet, you were still looking for something, honest now: right?

A: If I can find a reason to detain him, a legal reason to detain him, yes.

(R1-56-9).

Because under the *Valdez* test the events around the telephone booth were tainted, Petitioner's behavior during this encounter cannot be used as a basis for finding reasonable suspicion. *Wong Sun v. United States*, 371 U.S. 471 (1963).

The appellate court held that the vents inside the telephone booth gave the officers reasonable suspicion for the dog sniff of Petitioner's luggage. Even if the appellate court were correct in finding that the taint from the illegal seizure had been dissipated, the events inside the telephone booth cannot form the basis for finding reasonable suspicion. The telephone booth encounter occurred at approximately 11:00 p.m., more than one hour before Spark sniffed Petitioner's luggage inside the taxi shortly after 12:00 midnight. Further, the appellate court's conclusion is contrary to that of the Ocala officers who, after

the telephone booth encounter, surmised that they continued to lack reasonable, articulable suspicion to search or arrest Petitioner.

To hold that Petitioner's actions in attempting to avoid having Spark sniff his luggage created reasonable suspicion is inapposite to the holdings of this Court in *Florida v. Royer,* 460 U.S. 491, 498 (1983), *Florida v. Bostick,* 501 U.S. 429 (1991), and *United States v. Mendenhall,* 446 U.S. 544, 556 (1979). This Court has repeatedly held that refusal to consent may not form part of the basis for finding reasonable suspicion. A refusal alone does not furnish the minimal level of objective justification needed for detention or seizure. *Florida v. Bostick* at 430. In addition, Petitioner had, on at least two occasions, verbally refused to consent to a dog sniff of his luggage. Despite his clear refusal to consent, Officer Bovaird attempted to have Spark smell the luggage Petitioner was holding. Petitioner's acts in trying to prevent a nonconsensual dog sniff of his luggage were simply a physical manifestation of his verbal refusal to consent.

The Eleventh Circuit held that the events inside the telephone booth gave the officers reasonable suspicion. In his Report and Recommendation the Magistrate Judge found that Petitioner's conduct and behavior after the telephone booth encounter were not in any way dubious. Specifically, he held that walking late at night in Ocala, using two pay telephones and hiring a taxicab are not inherently or reasonably suspicious acts in light of the complete circumstances of this case.

Based on the foregoing, the officers had not developed reasonable suspicion as required by this Court under *Terry v. Ohio,* 392 U.S. 1 (1968) and; therefore, the

seizure of Petitioner was in violation of his Fourth Amendment rights.

THE WARRANTLESS SEARCH

Warrantless searches are per se unreasonable unless they fall within some established exception to the warrant requirement. *United States v. Place*, 462 U.S. 696 (1983). Here, the warrantless search took place after Petitioner's luggage was removed from the taxi cab and thus does not fall within the automobile exception to the warrant requirement. *United States v. Chadwick*, 433 U.S. 1, 6 (1977).

Officer Bovaird testified that there were no exigent circumstances that night which would have prevented the officers from obtaining a warrant. The officers did not even attempt to obtain a warrant.

> Q: So, there were no, you know, what exigent circumstances, I hate to use legalese, as far as you were concerned there were no exigent substantial reason why you couldn't have contacted a Judge or Magistrate, or an Assistant State Attorney, to help you prepare a warrant; is that correct?
>
> A: No sir, there was no reason why we could not have done that.

(R1-56-43).

Furthermore, the search was not incident to a lawful arrest because probable cause for the arrest was government created. The illegal seizure of Bonner and his luggage forced Petitioner to abandon the taxi he had hired.

The officers complete disregard for the constitutional safeguard of the Warrant Clause merits examination by this court.

CONCLUSION

A writ of certiorari should issue to review the Opinion of the Court of Appeals because of the outrageous police conduct involved in this case and because of the officers' wanton disregard of the law, in violating the warrant requirement of the Fourth Amendment. When eight police officers and two police dogs surrounded Mr. Bonner, the Petitioner, and told him he was free to leave it was a hoax. The only way the police could get the bags was by force. (R1-56-38). Petitioner's case represents a significant departure from the routine canine sniff addressed in *United States v. Place,* 462 U.S. 696 (1983).

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-3172
Non-Argument Calendar

D. C. Docket No. 94-10-CR-0C-10

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALEX C. BONNER,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(Filed May 30, 1995)

Before TJOFLAT, Chief Judge, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

The sole question presented in this appeal is whether the district court erred in denying appellant's motion to suppress evidence seized by the police following appellant's arrest for obstruction of a police investigation. We find no error and affirm.

We agree with the district court that appellant's initial detention at the Ocala train station, which was impermissible under *Terry v. Ohio*, 392 U.S. 1 (1968), ended when the police officers gave appellant his driver's

license and told him that he was free to go; at that point, a reasonable person would not have felt that he was not free to leave. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980). And, appellant did leave. Although the police followed him, they did so at a distance and did not interfere with his plans. In short, appellant's movement was wholly unfettered by police action; any taint from the impermissible detention at the police station had dissipated.

The question thus becomes whether the actions of Spark, the drug detection dog, inside the taxicab constituted a seizure. We agree with the district court that "Park's minimal intrusion with the luggage [did not] impair[ ] the Defendant's freedom of movement or meaningfully interfere[ ] with the Defendant's possessory interest in the luggage. Thus Spark's actions [were] not a seizure under the Fourth Amendment as interpreted by [*United States v. Puglisi*, 723 F.2d 779, 787 (11th Cir. 1984)], and cannot be the basis for suppressing the evidence seized after Spark later fully alerted to the luggage."

We also agree that, if Spark's actions in the taxi, which were quite brief in duration, constituted a seizure under the Fourth Amendment, the seizure was based on the "reasonable suspicion" that appellant was carrying drugs in his luggage. Appellant's behavior a few moments earlier gave rise to such suspicion; on seeing Spark approaching him, appellant raised his luggage (which contained cocaine) to his chest, tried to force his way into the telephone booth (which was already occupied), and then kicked Spark in an attempt to prevent the dog from sniffing the luggage.

In sum, appellant's argument fails for two reasons. First, the drug dog's brief "seizure" of the luggage was not a seizure under the Fourth Amendment. Second, if it was a seizure requiring reasonable suspicion under *Terry*, reasonable suspicion existed.

AFFIRMED*.

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* Judge Barkett concurs in the judgment.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

-vs- CASE NO. 94-10-Cr-Oc-10

ALEX C. BONNER

_____/

ORDER

(Filed Jul. 9, 1994)

This case is before the Court for consideration of two motions: (1) Defendant's motion to suppress evidence seized as a result of an unlawful search and seizure (Doc. 49), and, (2) Defendant's motion to suppress all evidence seized as a result of his arrest on June 9, 1994 (Doc. 50). After conducting an evidentiary hearing, the Magistrate Judge prepared a report and recommendation (Doc. 63) suggesting that the Court grant the first motion to suppress (Doc. 49) and deny the second motion to suppress (Doc. 50).

I. Defendant's First Motion to Suppress.

The Magistrate Judge recommended that the Court grant the Defendant's motion to suppress evidence seized as a result of an unlawful search and seizure (Doc. 49). The government filed an objection (Doc. 65) to the Magistrate Judge's report and recommendation, and a memorandum in support of the objection (Doc. 66), arguing that the first motion to suppress (Doc. 49) should be denied. The Defendant responded to the Government's

objection (Doc. 71), and the Court conducted a hearing on the motion on July 6, 1994.

The motion seeks to exclude evidence seized by Ocala police officers on October 3, 1990, after a drug detection dog named Spark alerted to the Defendant's luggage. On that date, Ocala police officers unlawfully detained[1] the Defendant in a train station, an officer requested permission for Spark to smell the outside of the Defendant's luggage, and the Defendant refused. (R&R, p. 4). About 15-20 minutes later, the officers told the Defendant that he was free to go. (R&R, p. 4).

An officer then offered to make a phone call on behalf of the Defendant, and, the Defendant accepted and gave a phone number to the officer. (R&R, p. 5). While the Defendant stood partially inside the telephone booth occupied by the Ocala police officer, another officer brought Spark towards the booth to sniff the luggage. (R&R, p. 5). After seeing the dog approaching, the Defendant raised the luggage to his chest, pushed himself into the telephone booth against the officer inside, and kicked toward Spark. (R&R, p. 5).

The Defendant then left the train station, and, the police officers continued to observe him as he walked several blocks to a nearby convenience store. (R&R, pp. 5 and 7). A taxi pulled up and the Defendant placed his luggage into its hatchback. (R&R, p. 7). An officer gave

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[1] The Magistrate Judge concluded in his report and recommendation that the detention of the Defendant in the Ocala train station was unlawful under *Terry v. Ohio*, 392 U.S. 1 (1968). (R&R, p. 12). The Court agrees with this conclusion.

the command to Spark to smell for drugs, and Spark leaped into the hatchback to smell the luggage. (R&R, p. 7) The Defendant immediately removed the luggage from under Spark and began to walk away from the taxi. (R&R, p. 7-8). Spark followed the Defendant, continued to sniff the luggage, and fully alerted to it.

The Magistrate Judge recommended that the motion to suppress be granted, finding that Spark's conduct "frustrated defendant's clear and repeated refusal to consent" and "frustrated defendant's obvious intention to leave the area in the cab." (R&R, p. 16). Despite these recommendations of the Magistrate Judge, the Court finds that the motion to suppress is due to be denied for two reasons: (1) Sparks actions were not a seizure under the Fourth Amendment, and (2) there was a reasonable suspicion that the Defendant was carrying drugs.

A. Spark's Actions Were Not A Seizure.

The Court finds that the Magistrate Judge erred by finding that the Defendant's luggage was unconstitutionally seized by Spark's actions. In *United States v. Puglisi*, 723 F.2d 779, 787 (11th Cir. 1984), the Eleventh Circuit stated that "courts should concern themselves with seizures of luggage only when those seizures impair the right of the possessor to freedom of movement with his luggage." After Spark leaped into the taxi, only a matter of seconds elapsed before the Defendant removed the luggage and proceeded to leave the scene. The Court does not find that Spark's minimal intrusion with the luggage impaired the Defendant's freedom of movement

or meaningfully interfered with the Defendant's possessory interest in the luggage. Thus, Spark's actions are not a seizure under the Fourth Amendment as interpreted by *Puglisi*, and cannot be the basis for suppressing the evidence seized after Spark later fully alerted to the luggage.

Moreover, the fact that Spark's conduct "frustrated defendant's clear and repeated refusal to consent" is irrelevant to the Court's determination of whether the police conducted an unlawful search and seizure. In *United States v. Place*, 462 U.S. 696 (1983), the Supreme Court found that a sniff test by a drug detection dog is not a search, and the Eleventh Circuit restated this principle in *Puglisi*. The Defendant's consent was not required for Spark to lawfully conduct a sniff test which is not a search. Spark's actions cannot be transformed into a search because the Defendant refused to consent to the sniff test, and cannot be an unconstitional search when the actions are not a search at all.

B. There Was a Reasonable Suspicion at the Time Spark Leaped Into the Cab.

Even if the Court assumes that Spark's actions were a seizure under the Fourth Amendment, the Court still finds that the motion to suppress is due to be denied. The Magistrate Judge correctly concluded that if Spark's actions were a seizure, a reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968), would justify the brief seizure by Spark. However, the Magistrate Judge found that the police officers lacked a reasonable suspicion for a *Terry* intrusion. The Magistrate Judge reached this conclusion

after finding that the Defendant's actions in and around the telephone booth could not be taken into account because these events were tainted by the earlier unlawful *Terry* stop inside the train station.

The Magistrate Judge relied on the Eleventh Circuit's decision in *United States v. Valdez*, 931 F.2d 1448 (11th Cir. 1991), to conclude that the events at the telephone booth were tainted. In *Valdez*, a police officer made a pretextual stop of the defendant for an alleged traffic violation. *Id.* at 1451. During the course of the stop, the officer asked for and received consent to search the vehicle. *Id.* The Court stated:

> In order to eliminate any taint from an involuntary seizure or arrest, there must be proof that the consent was voluntary and that it was not the product of the illegal detention. Among the [relevant] factors . . . are the temporal proximity of an illegal arrest and confession, intervening circumstances, and the purpose and flagrancy of the official misconduct.
>
> *Id.* at 1452 (quoting *United States v. Berry*, 670 F.2d 583, 604-05 (5th Cir. 1982)).

Applying this test, the Eleventh Circuit found that the consent was tainted by the illegal pretextual stop and detention, even though the officer informed the defendant that he did not have to consent. *Id.* at 1452.

The Court finds that *Valdez* is factually distinguishable from this case. In this case, the Defendant's "consent to remain at the station" is in question, not a consent to a

search[2]. (R&R, p. 13). Prior to the events in and around the telephone booth, an officer returned the driver's license and ticket to the Defendant and informed the Defendant that he was free to go. The officer did not offer to make a telephone call for the Defendant until after the Defendant had been so informed.

The Magistrate Judge correctly noted that the events around the telephone booth were in close temporal proximity to the tainted detention. However, the Court finds that the Defendant's suspicious behavior in the presence of police officers cannot be tainted because the Defendant voluntarily remained in their presence after being unequivocally informed that he could leave. Thus, the Court can reasonably consider the Defendant's behavior when determining if there was a reasonable suspicion sufficient to justify a subsequent *Terry* detention.

After seeing Spark approaching, the Defendant raised his luggage up to his chest, tried to force his way into the telephone booth, and kicked at Spark in an attempt to prevent the dog from sniffing the luggage. The Court concludes that this behavior is sufficient to develop a reasonable suspicion that the Defendant was carrying drugs. Therefore, even if Spark seized the Defendant's luggage when he leaped into the taxi later in the evening, this brief seizure was justified under *Terry* because of this reasonable suspicion.

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[2] In fact, no search ever occurred near the telephone booth. As discussed earlier, a dog sniff test is not a search. *United States v. Place*, 462 U.S. 696 (1983); *United States v. Puglisi*, 723 F.2d 779 (11th Cir. 1984).

C. Conclusion.

The Court disagrees with the recommendation regarding the Defendant's first motion to dismiss (Doc. 50). The Court finds that the motion is due to be denied for two reasons. First, the Court concludes that the drug detection dog's brief intrusion with the luggage in the taxi was not a seizure under the Fourth Amendment. Second, the Court concludes that even if it was a seizure requiring a reasonable suspicion under *Terry*, a reasonable suspicion existed based on the Defendant's earlier behavior at the telephone booth in the train station.

II. Defendant's Second Motion to Suppress.

Neither party objected to the Magistrate Judge's conclusions that the Court should deny the Defendant's motion to suppress evidence seized as a result of his arrest on June 9, 1994 (Doc. 50). Accordingly, the Court will deny the Defendant's second motion to suppress.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 94-10-Cr-Oc-10

ALEX BONNER

REPORT AND RECOMMENDATION[1]

I. Status

This cause is before the Court on the following two motions: (1) Motion to Suppress all Evidence Seized as a Result of an Unlawful Search and Seizure (Doc. #49), and (2) Motion to Suppress all Evidence Seized as a Result of Mr. Bonner's Arrest on April 14, 1994 (Doc. #50), both filed on June 9, 1994. An evidentiary hearing was held on June 14, 1994. The government has submitted a post-hearing memorandum. (Doc. #58).

For the reasons set forth below, the Court recommends that the motion to suppress (Doc. #49) be **granted** and the motion to suppress (Doc. #50) be **denied.**

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[1] The parties have stipulated to a five (5) day objection period within which to file written objections to this Report and Recommendation. Failure to do so shall bar the party from a *de novo* determination by a district judge of an issue covered herein and from attacking factual findings on appeal. *See* 28 U.S.C. 636(b)(1); Fed.R.Crim.P. 45(a) & (e); Local Rules 6.02(a) and 4.20, United States District Court for the Middle District of Florida.

II. Findings of Fact

Keith Escaravage is an investigator assigned to the City of Ocala Police Department's Street Crimes Unit. In this capacity he concentrates on street level drug activities, burglaries, and surveillances for street crimes. On October 3, 1990, at approximately 6:00 p.m. he received a telephone call at home from Sgt. John Murray of the Hollywood, Florida Police Department. Sgt. Murray gave Officer Escaravage the following information: Sgt. Murray was working an Amtrak drug program that day and had been at the Amtrak train station outside Ft. Lauderdale, Florida. Sgt. Murray observed a black male who seemed to be avoiding contact with him by staying on a pay telephone for a long period of time. Sgt. Murray approached this person, identified himself, and asked for identification. Sgt. Murray had no information concerning drug transactions at that time and had not observed the person do anything unlawful. The person produced a valid driver's license identifying him as Alex C. Bonner and produced a valid train ticket with a destination of Ocala, Florida. Bonner acted very nervous and was sweating profusely. Sgt. Murray requested permission to search three pieces of luggage Bonner was carrying, but Bonner refused to consent. Sgt. Murray then asked permission to have a drug detection dog sniff the luggage; Bonner again refused to consent. Sgt. Murray detained Bonner while he ran a "wants and warrants" check, finding none. Because Bonner's train had arrived and Sgt. Murray had no legal reason to detain him further, he allowed Bonner to board the train for Ocala. Sgt. Murray is a very experienced officer and told Officer Escaravage that he had a "gut feeling" that Bonner was carrying

drugs. Sgt. Murray provided a detailed description of Bonner, and relayed this information so that the Ocala police could develop probable cause if possible. Sgt. Murray had provided similar information to the Ocala police two weeks earlier about a different individual which had proven correct.

Officer Escaravage contacted his supervisor and made arrangements to have members of his unit meet later that evening. Officer Escaravage also ran a criminal record check on Bonner, but did not run a check for outstanding arrest warrants. Eight police officers met at the local bus station at approximately 9:30 p.m. for a briefing concerning Bonner's arrival.

The officers then went to the Amtrak station where they took various surveillance positions. The Ocala Amtrak station is located in a business district which, except for the bus station, is virtually deserted at that time of night. As the officers arrived and were setting up their surveillance, they observed a Blazer speed out of the train station parking lot. Some of the officers followed this vehicle and stopped it. As the train was arriving these officers radioed back to the officers at the train station that the driver was Jerome Robinson, a person with known prior arrests for narcotics and assaults. No information connected Robinson with Bonner.

The train with Bonner arrived at the Ocala Amtrak station at approximately 10:20 p.m. Bonner disembarked and there was nothing unusual about his appearance; Officer Escaravage testified he looked like any tourist. Bonner was approaching the train station with the other passengers when Officers Escaravage and Larry Butler

approached him, identified themselves as police officers and displayed their badges, asked if he was the same Alex Bonner who had been stopped in South Florida, and asked for identification. Bonner, who was carrying a garment bag and two carry-on type bags, said he was the same person, and began complaining about racial harassment in the stops. Nonetheless, Bonner produced a valid driver's license and train ticket. Officer Escaravage retained Bonner's driver's license while he radioed for a check for "wants and warrants". Officer Escaravage explained to Bonner that they had had a problem with people bringing drugs into Ocala on the train, and asked for permission to search his luggage. Bonner refused. Officer Escaravage requested permission to have a drug dog smell the outside of the luggage, and Bonner refused that request. Bonner was escorted toward the train station and was detained for approximately 15-20 minutes while the "wants and warrant" check was completed. During this time Bonner complained of harassment and the officers discussed the drug problem. Bonner stated he was in Ocala to see a Katrina Robinson, who Officer Escaravage believed to be either the wife or sister of Jerome Robinson. The other passengers who had arrived on the train had all departed while Bonner was being detained.

While they were waiting for the warrant check, Deputy Terry Bovaird called an Assistant State Attorney (ASA) and gave her some of the facts. The ASA opined that there was not sufficient probable cause to arrest or to search the luggage. The warrant check came back negative, as it had in South Florida. Bonner was given his driver's license back and was told he was free to go.

In an attempt to further the investigation, Officer Butler offered to call Katrina Robinson for Bonner from the telephone booth at the Amtrak station. Bonner gave Officer Butler a telephone number; Officer Butler dialed the number, identified himself and explained that Bonner needed a ride; the person hung up or was disconnected. Officer Butler relayed this to Bonner, and dialed the number again. The person denied knowing Bonner and said she was not coming to the train station. Bonner said he wanted to speak with the person; he entered the telephone booth while still carrying his three pieces of luggage, and spoke on the telephone briefly. As Bonner was partially in the telephone booth, Deputy Bovaird brought his drug detection canine, a blonde labrador retriever called Spark the Narc (known to his friends simply as Spark), towards the telephone booth in order to sniff the luggage. Bonner saw the dog coming, raised the luggage up to his chest, and pushed himself and the luggage further into the booth and against Officer Butler, who was still in the booth. Officer Butler, not knowing exactly what Bonner was doing, pushed him back; Bonner kicked toward Spark, who backed off; Bonner exited the telephone booth carrying his luggage high and out of close smelling range of the canine.

After the situation settled down, the officers were satisfied that Bonner had not attempted any criminal activity and was merely trying to avoid letting the dog sniff his luggage. Bonner was told he was free to go; he asked directions to motels while holding his luggage high, and began walking away from the train station. A taxicab appeared at that time in the train station parking lot; Bonner approached the taxicab, appeared to have a

conversation with the driver, and the taxicab then left without Bonner, who resumed walking from the parking lot.

The officers met and discussed the matter. They concluded that while they too believed defendant was carrying drugs, they continued to have an insufficient legal basis to search or arrest. Sgt. Miller authorized overtime to continue surveillance of Bonner for intelligence purposes, such as determining where he went and who he met. Three of the eight officers were sent off the detail, and the remaining five officers got into four vehicles to begin their surveillance of defendant. The officers found defendant three blocks from the train station, still walking. Because the officers did not attempt to conceal themselves, it was obvious to defendant that he was the object of a surveillance.

Defendant walked to a pay telephone, where he made two or three telephone calls. Surveillance vehicles parked at various locations and watched. Defendant then walked over to Officer Escaravage, sitting in his Honda surveillance vehicle, and spoke with him for about 20 minutes. Deputy Bovaird pulled up with Spark in a vehicle, and Bonner stopped his conversation in mid-sentence and walked back to the pay telephone. Deputy Bovaird then went to the pay telephone, using a telephone immediately adjacent to defendant. Defendant thereupon returned to Officer Escaravage while Deputy Bovaird was on the telephone, and then left the area when Deputy Bovaird went toward the dog.

Defendant walked two blocks north and four blocks west, then stopped at a Circle K convenience store. Surveillance followed. It was now approximately 12:00 midnight and the store was closed. Defendant placed his luggage on the ground and went to use a pay telephone 15-20 feet from the luggage. Deputy Bovaird decided to walk Spark past the luggage since it was unattended. As he was approaching with Spark, a station wagon taxicab pulled up. Defendant spoke briefly with the driver, who then opened the hatchback of the station wagon. Within a matter of seconds, Bonner grabbed his luggage and threw it into the rear of the taxicab; Deputy Bovaird gave the command for Spark to smell for drugs; Spark jumped into the back of the taxicab onto the luggage; the cab driver started to close the hatchback on Spark; and Deputy Bovaird prevented the driver from doing so by stopping the hatchback door from coming down. After Deputy Bovaird had given Spark the explicit order to smell for drugs, he had not expected Spark to jump into the taxi, but to merely smell the luggage from the outside. The officers ultimately concluded that the cab driver was not trying to injure the dog or frustrate their activity, but had just attempted to close the hatchback as a matter of reflex after the luggage had been placed inside.

Defendant Bonner grabbed his luggage from the taxi and pulled it out from under Spark. Spark was in the process of sniffing the luggage, and there was a noticeable change in his behavior. Officer Bovaird testified that such a "noticeable change" was essentially a precursor to an alert to the detection of the odor of drugs. Bonner began walking with his luggage away from the taxicab, and Spark, who had by now pulled himself free of his

leash, was following Bonner and making a full alert to the luggage Bonner was carrying. Deputy Bovaird told Bonner that Spark had alerted to the odor of drugs and ordered him to put down the luggage. Bonner refused, commenting in the vernacular that the legal process thus far seemed to leave something to be desired. Deputy Bovaird repeated the order to put the luggage down several times, and Bonner refused to do so. The officers decided to arrest Bonner for the misdemeanor of obstructing an officer because of his refusal to put the luggage down. A scuffle then ensued between Bonner and Officer Escaravage; defendant was eventually forcibly escorted to the police vehicle, yelling that the officers did not have his permission to have the dog sniff his luggage. Spark was allowed to walk by the luggage and again alerted on it. A second drug detection dog, Sharky, had been brought to the area unsolicited, walked by the luggage for practice and alerted to it.

The officers opened the luggage at the scene, finding 1,200 grams of powder cocaine in one of the carrying bags. The officers testified that the luggage was searched pursuant to the standard inventory policy of the Ocala Police Department. The drugs were field tested, photographed, and then placed back into the bag. Defendant was given *Miranda* warnings, and invoked his rights to remain silent and to have an attorney. Defendant and the luggage were transported to the Ocala Police Department, where a more thorough inventory search was performed. The officers seized the 1,200 grams of cocaine, and found $2,800 in currency and an address book. These items were retained, and defendant and the remainder of the luggage were sent to the jail. Jail personnel performed

a routine examination of the luggage and found an additional small quantity of cocaine in one of the bags.

On March 16, 1994, three and one-half years later, defendant was indicted by a federal grand jury in Jacksonville, and an arrest warrant was issued. On April 14, 1994 Drug Enforcement Administration (DEA) Special Agent Lawrence Holland, Officer Escaravage, and Officer Bovaird went to defendant's Miami address and began a surveillance at approximately 6:15 a.m. By 11:00 a.m. they had observed two females leave the residence and the officers went to the front door and knocked. They received no immediate response, but heard someone inside trying to answer. Defendant had been taking a shower and opened the side door attired only in a towel. The officers went to the side door, identified themselves, advised defendant of the warrant and that he was under arrest. They entered the house and some of the officers performed a security sweep, finding nothing. Defendant was given full *Miranda* warnings and invoked his right to counsel and to remain silent. The officers explained that they would escort him to his bedroom and assist him in getting dressed. They did so, gathering the clothes which defendant identified he wanted to wear. In this process Special Agent Holland observed a digital pager sitting on a bureau with a label "Sunshine Pager Service". Special Agent Holland seized this pager because he knew pagers were generally tools of the drug trade and he had information that defendant used a pager in his drug business. Specifically, his analysis of telephone toll records had led him to identify a telephone number subscribed to Sunshine Pager Service, which he later determined was

leased to defendant. Defendant refused consent to a search of his residence.

III. Conclusions of Law

Defendant does not challenge the conduct of Sgt. Murray in Hollywood, Florida but does challenge virtually everything that occurred in Ocala, Florida on October 3, 1990. He also challenges the lawfulness of the seizure of the pager from his bedroom in 1994.

A. Ocala Train Station Events:

The initial approach to defendant was not unlawful. *Florida v. Bostick,* 111 S.Ct. 2382, 2386 (1991) stated:

> [E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage – as long as the police do not convey a message that compliance with their requests is required. (citations omitted).

When Officers Escaravage and Butler approached defendant and asked his identity and for identification documents, they needed no level of suspicion and their conduct was not a "seizure" of Bonner. *Florida v. Rodriguez,* 469 U.S. 1, 5-6 (1984).

This initial encounter soon became a seizure, however. As *Florida v. Bostick,* 111 S.Ct. at 2389 stated:

> [I]n order to determine whether a particular encounter constitutes a seizure, a court must

> consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.

When Bonner's driver's license was confiscated and retained and he was escorted from the train tarmac to the outside of the train station, he was "seized"; a reasonable person, considering all the circumstances, would not have felt free to leave. Bonner had been stopped in Hollywood, produced his driver's license and had a wants and warrant check run with negative results. In Ocala two officers made reference to this, and again requested his driver's license. Defendant was escorted by police from the train tarmac to the outside of the station near the telephone booth. His driver's license was retained for 15-20 minutes while another wants and warrants check was run. Defendant was in an unfamiliar city, late at night, in a train station where shortly after his arrival there was no one present except himself and the officers. Until the officers told him he was free to leave and gave back the driver's license, a reasonable person would have believed he was not free to leave.

This seizure of Bonner was lawful if the officers had specific and articulable facts which, taken together with rational inferences from the facts, created a reasonable suspicion that Bonner had committed or was about to commit a crime. *United States v. Sokolow,* 490 U.S. 1, 7-11 (1989); *Terry v. Ohio,* 392 U.S. 1 (1968). Considering the totality of the circumstances known to the officers, reasonable suspicion was lacking in this case. It is clear that

Sgt. Murray, the officer in Hollywood, had only the classic "hunch", and correctly determined that he had insufficient reasonable suspicion to detain or search defendant. Eg., *United States v. O'Neal*, 17 F.3d 239, 240-42 (8th Cir. 1994), *pet. for cert. filed* May 24, 1994. This is binding on the Ocala officers unless they developed additional facts. *United States v. Hensley*, 469 U.S. 221, 232-33 (1985). The Ocala officers did not develop any additional incriminating facts, but merely again confirmed the absence of any arrest warrants. Defendant looked like an ordinary tourist; there was no nervousness, profuse sweating, or other behavior which was unusual. Eg., *United States v. Brown*, 731 F.2d 1491, 1493 (11th Cir. 1984). Defendant's repeated assertion of his Fourth Amendment rights adds nothing to the level of suspicion, for to do so would be to improperly punish the exercise of those rights. The level of suspicion in Ocala remained no more than a hunch. Therefore, there was not a reasonable suspicion to detain defendant at the Ocala train station.

Defendant was detained 15-20 minutes and then told he was free to leave.[2] An additional period of time was taken by the interesting events in the telephone booth.

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[2] Even if there was reasonable suspicion, the length of a *Terry* stop must be limited in scope and duration, and should be the least intrusive means reasonably available to verify or dispel the officers' suspicions in a short period of time. *Florida v. Royer*, 460 U.S. 491, 500 (1983); *United States v. Sokolow*, 490 U.S. at 10-11. Here, the length of the detention was not justified. The officers had four hours to run a wants and warrant check if a second one was necessary, and the delay caused by this repeated procedure appears as if it was intended to keep defendant in their presence in the hope that something useful would develop.

The government argues that this time segment was not a detention but rather was a consensual encounter, pointing to the fact that defendant voluntarily gave the telephone number to the officers. Consent following a Fourth Amendment violation is only valid if it is not tainted from the prior unlawful conduct. "In order to eliminate any taint from an involuntary seizure or arrest, there must be proof that the consent was voluntary and that it was not the product of the illegal detention. Among the [relevant] factors . . . are the temporal proximity of an illegal arrest and confession, intervening circumstances, and the purpose and flagrancy of the official misconduct." *United States v. Valdez*, 931 F.2d 1448, 1452 (11th Cir. 1991), quoting *United States v. Berry*, 670 F.2d 583, 604-05 (5th Cir. 1982) (*en banc*). Here, the consent was in close proximity to the illegal arrest and there was no intervening circumstances. The Court concludes that the consent to remain at the station was tainted by the illegal detention, and the events in the telephone booth cannot be utilized to form the basis of any level of suspicion.

The government concedes the "probable" illegality of the train station detention. It argues, however, that the subsequent events are admissible because the taint was dissipated and defendant was arrested for a new, untainted offense – obstructing an investigation. The Court agrees in part.

The Court agrees that the taint for the unlawful detention at the train station became dissipated and was not exploited. Defendant was told he was free to leave and his driver's license had been returned to him. He approached a taxicab in the train station parking lot and, for reasons unknown to this record, did not retain its

services. Defendant then walked from the train station, unimpeded and unsurveilled by the officers. The Court concludes that these were intervening events which dissipated any taint from the unlawful detention. *United States v. Bailey,* 691 F.2d 1009, 1013-15 (11th Cir. 1982), *cert. denied* 461 U.S. 933 (1983).

Defendant walked at least three blocks before police officers arrived and began an overt surveillance of his walking. Defendant argues that the overt surveillance was either a continued seizure or a new Fourth Amendment violation. The Court cannot agree. No level of suspicion or probable cause is required before officers may place a person or location under surveillance. *United States v. Knotts,* 460 U.S. 276 (1983). "As a general proposition, the police may see what may be seen 'from a public vantage point where they have a right to be.' " *Florida v. Riley,* 488 U.S. at 445-49, quoting *California v. Ciraolo,* 476 U.S. 207, 213 (1986). The overt surveillance conducted here cannot be equated with a "seizure" because "[w]hile the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure." *Michigan v. Chesternut,* 486 U.S. 567, 575 (1988) (footnote omitted). Defendant was well aware of the fact that the officers were not stopping him; he voluntarily approached an officer to speak for 20 minutes and then left unimpeded after the canine officer arrived. A person is "seized" within the meaning of the Fourth Amendment only when, in view of all the circumstances surrounding the incident, an objectively reasonable person would believe that the police have communicated he is not free to decline the officer's

request to stop and the person complies with the request. *California v. Hodari D.*, 499 U.S. 621 (1991); *Florida v. Bostick, supra.* This did not occur with the surveillance of Bonner.

The conduct of Spark the Narc at the Circle K is the next incident with Fourth Amendment ramifications. The facts establish a reasonable inference that defendant agreed with the taxicab driver to retain his services. After a brief discussion with defendant the cab driver opened the rear hatchback door, and defendant placed his luggage into the cab. There can be a reasonable expectation of privacy in a taxicab, *Rios v. United States*, 364 U.S. 253, 262 n.6 (1960), and under these facts defendant probably had such an expectation. There is no doubt, however, that defendant continued to have a reasonable expectation of privacy in his luggage. *United States v. Place*, 462 U.S. 696, 701 (1983). The issue becomes whether there was a search or seizure when Officer Bovaird gave Spark the order to smell for drugs and Spark jumped into the cab and onto the luggage.

The use of a trained, qualified drug detection dog to sniff the outside of luggage is usually not a search, and therefore no warrant or any level of suspicion is required. *United States v. Goldstein*, 635 F.2d 356, 360-62 (5th Cir.), *cert. denied* 452 U.S. 962 (1981). *See also United States v. Place, supra; United States v. Hardy*, 855 F.2d 753, 759 n.10 (11th Cir. 1988), *cert. denied* 489 U.S. 1019 (1989); *United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir.), *cert. denied* 114 S.Ct. 155 (1993); *United States v. Williams*, 784 F.Supp. 1553, 1560 (M.D. Fla. 1991), *aff'd* 978 F.2d 721, *cert. denied* 113 S.Ct. 1354 (1993). The events in this case, however, are not the type of "brief, minimally intrusive" dog sniff

routinely contemplated. *United States v. Hardy*, 855 F.2d at 759. Spark jumped into defendant's taxicab and onto his luggage before he was able to smell anything. This conduct frustrated defendant's clear and repeated refusal to consent. The conduct of Spark, coupled with Officer Bovaird's prevention of the driver from shutting the hatchback, also frustrated defendant's obvious intention to leave the area in the cab. The conduct of Spark was not so unexpected or unforeseeable that his behavior should not be imputed to the officers.[3] Where personal property is involved, a seizure is "some meaningful interference with an individual's possessory interest in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Spark's conduct and that of Officer Bovaird effectively prevented defendant from using the cab he had just hired, impairing his right to freedom of movement with his luggage. *United States v. Puglisi*, 723 F.2d 779, 787-88 (11th Cir. 1984). Under the unique facts of this case, the Court finds defendant and his luggage were seized.

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[3] The Court is aware of cases finding no Fourth Amendment violation when a canine on its own instinctive initiative enters a vehicle already legitimately stopped. *United States v. Stone*, 866 F.2d 359, 363-64 (10th Cir. 1989) (dog jumped into open hatchback stopped on reasonable suspicion of narcotics); *United States v. Watson*, 783 F.Supp. 258, 265 (E.D. Va. 1992) (no Fourth Amendment violation when dog jumped into open passenger door of vehicle, absent any evidence that the officers encouraged the dog to jump into the car); *Idaho Department of Law Enforcement v. $34,000*, 824 P.2d 142 (Id. Ap. 1991) (no violation when dog, disobeying command, instinctively jumped into open trunk). Here, the command by Officer Bovaird reasonably caused Spark's conduct.

This seizure would be lawful if by this time the officers had developed the *Terry* suspicion. There had been no additional facts which gave the officers reasonable suspicion of any criminal activity at the time of Spark's entry into the cab. Walking late at night in Ocala using two pay telephones and hiring a taxicab are neither inherently suspicious or reasonably suspicious when coupled with the totality of the circumstances in this case. Therefore, the seizure was unlawful and the subsequent alert by Spark was the fruit of that unlawful seizure.

The government's reliance on *United States v. Bailey*, 691 F.2d 1009 (11th Cir. 1982), *cert. denied* 461 U.S. 933 (1983) is misplaced under the facts of this case. *Bailey* held that "notwithstanding a strong causal connection in fact between lawless police conduct and a defendant's response, if the defendant's response is itself a new, distinct crime, then the police constitutionally may arrest the defendant for that crime." *Id.* at 1016-17. The crime there was flight and assaulting the officer. This case more closely resembles those discussed in *Bailey* where suppression was upheld. The policy reasons supporting *Bailey* are not applicable to defendant's conduct in this case.

B. Seizure of Pager:

Special Agent Holland was lawfully in defendant's bedroom while defendant dressed. He saw the pager in plain view and properly seized it. *Horton v. California*, 496 U.S. 128, 133 (1990). Special Agent Holland knew not only the general evidentiary value of pagers, *United States v. Jaramillo-Suarez*, 950 F.2d 1378, 1385 (9th Cir. 1991) *as amended on denial of rehearing* (Dec. 16, 1991), but specific

information relating to defendant. The seizure of the pager was lawful.

III. Recommendations

1. The Motion to Suppress all Evidence Seized as a Result of an Unlawful Search and Seizure (Doc. #49) be **GRANTED.**

2. The Motion to Suppress all Evidence Seized as a Result of Mr. Bonner's Arrest on April 14, 1994 (Doc. #50) be **DENIED.**

DONE AND ORDERED at Jacksonville, Florida, this 23rd day of June, 1994.

/s/ John E. Steele
UNITED STATES
MAGISTRATE JUDGE

Copies:

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AMENDMENT IV TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.